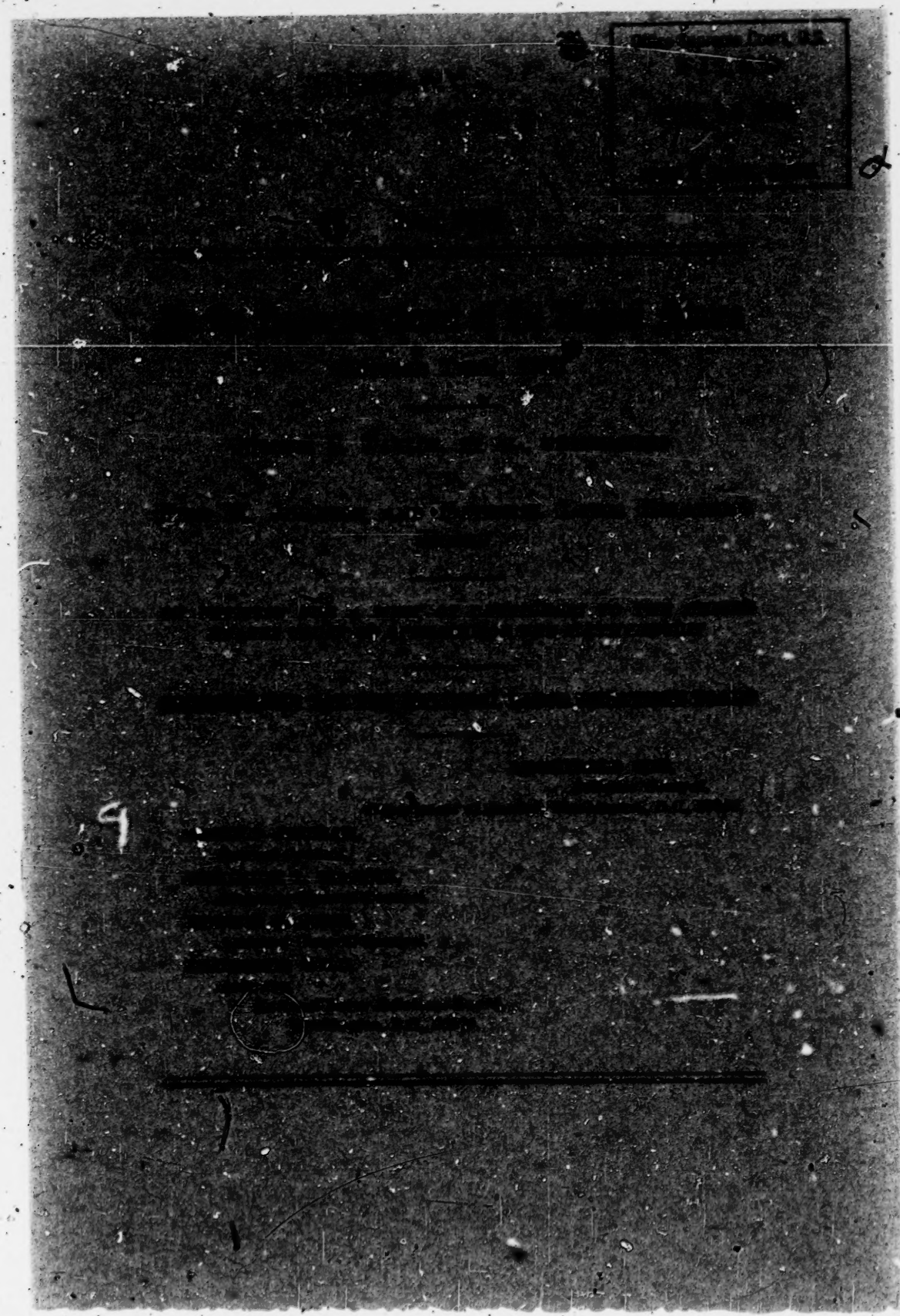

CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 795

MOLLIE S. TAYLOR, ET AL., PETITIONERS

v.

FRED H. JOHNSON AND NATIONAL LABOR RELATIONS BOARD[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The issue in the case is whether the respondent employer ("Atlas") had sufficient notice that it was being charged in the administrative proceedings before the National Labor Relations Board with discriminatorily discharging (as distinguished from refusing to hire) certain employees. The petitioners, discharged employees who filed charges with the Board against Atlas, were permitted to intervene in the court of appeals (Pet. 27), and thus have standing to file the instant petition. *International Union*

[1] The petition erroneously named the Board as a petitioner rather than as a respondent.

of Misc., Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 338. The petition was timely filed,[1] and the jurisdiction of this Court is properly invoked under 28 U.S.C. 1254(1).

Based upon petitioners' charges, the General Counsel of the Board issued a complaint alleging that, from April 9 to 14, 1959, petitioners engaged in an economic strike against Atlas, and that thereafter Atlas refused to reinstate them because of their strike and union activities, in violation of Section 8(a)(3) of the Act (Pet. 29–30). The Trial Examiner found that Atlas unlawfully discriminated against petitioners by discharging them, on the first day of the strike, because they had gone out on strike, and recommended that they be reinstated with back pay (B.A. 281a–283a, 306a).[2] In its first decision, the Board rejected the finding of discriminatory discharge, on the ground that that issue was not raised in the complaint or fully litigated at the hearing. The Board found however, that there was a discriminatory denial of reemployment, since, when the employees abandoned the strike on April 14, they were denied

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[1] The judgment of the court of appeals was entered on September 4, 1963 (Pet. 1). On November 27, 1963, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including February 1, 1964. The petition was filed on January 29, 1964.

[2] "B.A." refers to the printed appendix to the Board's brief in the court below. One of the petitioners, David Hall, was excluded from the reinstatement and backpay remedy because of his participation in uncondoned strike misconduct (B.A. 300a–301a).

reinstatement although they had not been permanently replaced (B.A. 255a). But on reconsideration the Board, finding that the record showed that the strikers had been replaced by April 11 (B.A. 324a), set aside its earlier ground of decision and adopted the Trial Examiner's finding that the employees had been discriminatorily discharged. The Board explained its reversal of position as follows (B.A. 322a):

> * * * while the better practice might have been to specifically allege discriminatory discharges, we do not think that the allegations that were made necessarily excluded consideration of the issue whether these employees had a right to reinstatement and reemployment arising from the Respondent's discharge of them for engaging in the strike * * *. However, aside from the matter of whether the complaint alleged with sufficient particularity the discharge issue, we are convinced that the parties fully litigated this question and it was [in] issue at the hearing.

The court of appeals rejected the Board's finding that the strikers had been discriminatorily discharged, and denied enforcement of the reinstatement and backpay provisions of its order.[*] The court stated (Pet. 20):

> From our examination of the complaint, the applicable law and the record as a whole, we cannot agree that the language of the com-

[*] The court enforced the portion of the Board's order requiring certain other acts of restraint and coercion, which the Board found were violative of Section 8(a)(1) of the Act (Pet. 23; B.A. 304a-306a).

plaint reasonably gave notice of the issue of discriminatory discharge, nor can we agree that the matter of discriminatory discharge was fully litigated.

The question presented is whether Atlas was sufficiently apprised, by the complaint and during the Board hearing, that it was being charged with having discharged the petitioners because of their strike activities. The answer to this question depends upon the facts and circumstances of this particular case. The Board, based on its analysis of the record, concluded that Atlas had adequate notice of the issue; the court below, however, reached a contrary conclusion.[5] While the Board believes that its evaluation was reasonable, it did not petition for certiorari because it was of the view that the court of appeals' contrary appraisal of the record did not present an issue of sufficient importance to warrant review by

[5] The court distinguished *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349–350, which involved a similar situation. The court stated (Pet. 23):

"Notwithstanding, * * * possible references to the discharge issue, upon considering the record as a whole, we cannot avoid the conclusion the discriminatory discharge was an issue unrecognized by [Atlas] and not one that should have been readily perceived from the progress of the proceedings. We cannot find from this record as did the Supreme Court from the record before it in *Labor Board* v. *Mackay Company*, *supra*, that there was no misunderstanding as to the basis of the Board's complaint."

this Court. Should the Court grant this petition, however the Board would defend its decision.

Respectfully submitted,

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